Supreme Court, U.S.
FILED
NOV 10 1971
CLERK

In The

# Supreme Court of the United States

October Term, 1971

No. 71-479

KATHLENE C. MARENO and ANTONIO MARENO,

*Petitioners,*

*vs.*

WESTCHESTER ROCKLAND NEWSPAPERS, INC., and RAYMOND MARGLES,

*Respondents.*

## BRIEF OF PETITIONERS IN REPLY TO RESPONDENTS' BRIEFS

ANTONIO MARENO and
KATHLENE C. MARENO
*Petitioners pro se*
3505 Tulip Drive
Yorktown Heights, New York 10598

(4946) LUTZ APPELLATE PRINTERS, INC.
Law and Financial Printing
South River, N.J. (201) 257-6850 | New York, N.Y. (212) 565-6377 | Philadelphia, Pa. (215) 563-5587

## INDEX TO BRIEF


*Page*

Brief of Petitioners in Reply to Respondent's Briefs . . . . . 1

Argument:

I. The state of civil appellate procedure in New York prior to the CPLR left the legislature no choice but to delete the the reference to attorneys and to require service of the notice of entry upon the litigant. . . . . 2

II. The Mandell case is controlling in the Second Department on the questions of unilateral inconsistencies and credibility raised on a motion for summary judgment. . . . . 9

III. The question of damages, if relevant, was obviously misunderstood by the New York Courts, and, apparently, by the respondents before this court. . . 11

Conclusion . . . . . 15


## Table of Citations

CASES CITED:


Bergman v. Kumm (not officially cited); 213 N.Y.S.2d 832 . . . . . 9

Boyles v. Freeman, 29 A.D.2d 559 . . . . . 9

Colosimo v. Rosenstock, 15 A.D.2d 663 . . . 9

*Index*

*Page*

Cooper v. Greyhound Bus Corporation, 13 A.D.2d 173 . . . . . 9

Glain v. Glain, 57 Misc.2d 127 . . . . . 9

Matter of Savoy (not officially cited); 232 N.Y.S.2d 396, affirmed, 22 A.D.2d 855 . . . . . 6

McNeil Laboratories, Inc. v. LaVerne, N.Y. L.J. November 24, 1971, p. 1, Col. 6B . . 10

Olivieri v. Moran (not officially cited); 213 N.Y.S.2d 628 . . . . . 9

Rogers v. Hirshon (not officially cited); 213 N.Y.S.2d 613 . . . . . 9

Sonnino v. Gol-Pak Corporation, 15 A.D. 2d 740 . . . . . 9

**STATUTES CITED:**

New York State Civil Practice Law and Rules:

2103(b) . . . . . 4, 5

5513 . . . . . 5

5513(a) . . . . . 4, 5

5513(c) . . . . . 6, 7, 8

*Index*

*Page*

**OTHER AUTHORITIES CITED:**

2 McKinney's N.Y. Laws 1962, p. 3621 . . . 2

McKinney's Cons. Laws of N.Y., Book 7B (CPLR 7701 to end) Comparison Table 1, p. 473 . . . . . 4

Clevenger's Practice Manual, 1962 Annual, Sections: 163, 592(1), 612, 624 (1), 632 . . . . . 3, 4, 5

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1971.

No. 71-479

KATHLENE C. MARENO and ANTONIO MARENO,

*Petitioners,*

*vs.*

WESTCHESTER ROCKLAND NEWSPAPERS, INC., and RAYMOND MARGLES,

*Respondents.*

---

## BRIEF OF PETITIONERS IN REPLY TO RESPONDENTS' BRIEFS

---

In the belief that this court applies its own test as to whether a procedural default sustained in a state court action is based upon an adequate non-federal ground petitioners are moved to answer herein some of the arguments advanced in the responding briefs which seem in need of reply.

## Argument

### I.

THE STATE OF CIVIL APPELLATE PROCEDURE IN NEW YORK PRIOR TO THE CPLR LEFT THE LEGISLATURE NO CHOICE BUT TO DELETE THE REFERENCE TO ATTORNEYS AND TO REQUIRE SERVICE OF THE NOTICE OF ENTRY UPON THE LITIGANT.

In signing the CPLR into law Governor Rockefeller's Memorandum of Approval reflects the concerns of the state legislature in the revision of civil practice in New York when he stated (2 McKinney's N.Y. laws '62, p. 3621):

> "The bills repeal the present Civil Practice Act and enact a new Civil Practice Law and Rules, to be effective on September 1, 1963. The new law, which will regulate the practice in the Courts of Record in the State, is a major restatement and clarification of existing law. Great numbers of conflicting and confusing provisions, resulting from years of piecemeal amendment, have been eliminated. The more than 2,000 sections of the present Civil Practice Act and Rules of Civil Practice have been reexamined and reduced to 600 sections in the new law."

Nowhere was this conflict and confusion more evident than in the prior provisions dealing with the subject of limitation of time to prosecute civil appeals.

The CPA had four provisions relating to direct appeals, namely, sections 592(1), 612, 624 (1), and 632. (See Clevenger's Practice Manual, 1962 Annual, CPA sections 592(1), 612, 624(1), and 632.) The first three provisions governed appeals in actions from interlocutory and final dispositions, and uniformly required service of the notice of entry upon "the attorney for the appellant". Section 632 only governed appeals in special proceedings from final dispositions, and required the service of the notice of entry upon "the appellant; or, if he appeared upon the hearing by an attorney at law or an attorney in fact, upon the person who so appeared for him".

Under the CPA when the term "appellant" was used by itself to designate the person upon whom the notice of entry was required to be served as was the case with section 632 noted above, the term referred to the litigant and not to an attorney. The trouble was with the expression "attorney for the appellant" as used in sections 592(1), 612, and 624(1) noted above. While this term was satisfactory when used to designate the person upon whom the notice of entry was to be served in the case of interlocutory appeals, the term was anachronistic when attempted to be applied to situations involving final dispositions for the reason that under common law doctrine in New York, recognized by the legislature in CPA section 632, the authority of the attorney ceased upon the entry of the final judgment (See In re Luckenbach's Will, cited on page 15 of the petition), and as a consequence, the attorney for the defeated party at the termination of the litigation could not be designated "the attorney for the

appellant", whatever else he might be called in such posture.

The New York legislature quietly solved this problem encountered in CPA sections 592(1), 612, and 624 by (1) abolishing the distinction between actions and special proceedings (McKinney's Cons. Laws of N.Y., Book 7B, Section 103(b)), (2) merging these statutes together with CPA section 632 into a single statute, namely, CPLR 5513(a), (McKinney's Cons. Laws of N.Y., Book 7B - CPLR 7701 to End - Comparison Table 1, page 473), and (3) borrowing from CPA section 632 the word "appellant" to measure the limitation of appeal time as to both interlocutory and final dispositions, it being apparent to the legislators that the word "appellant" was susceptible of no double meaning in the predecessor statute.

It is to be noted that the aforementioned changes would not have been necessary in the transition from the CPA to the CPLR had CPA section 163, the predecessor of CPLR 2103(b), been applicable to these specific appeal provisions of the CPA. CPA section 163 read in relevant part (Clevenger's Practice Manual, 1962 Annual, section 163):

> "Where a party has appeared a notice or other paper required to be served in an action must be served upon his attorney. . . This section shall not apply . . . to a case where the mode of service is specially prescribed by law."

However, as the last sentence noted above indicates, CPA section 163 was residual in its application. And since the mode of service was specifically prescribed by law in sections 592(1), 612, 624(1), and 632, section 163 was inapplicable to these provisions. And the same relationship exists under the CPLR between section 5513 and Rule 2103(b) in view of the prefatory language in Rule 2103(b), "Except where otherwise prescribed by law or order of court" which relegates that rule to residual status under the CPLR also. Consequently, to accord Rule 2103(b) other than residual status as contended for by respondents, vis-a-vis section 5513, would be to read back into section 5513 the anachronistic posture and uncertainty of meaning that the legislature undertook to eliminate in the adoption of section 5513. And we do not know that the Court of Appeals applied Rule 2103(b) in its disposition of petitioners' motion for leave to appeal from the Appellate Division's order of affirmance. That court's view on the subject has simply not been made public.

Petitioners have called attention to the history of CPLR 5513(a) because the effect of the decision of the Court of Appeals on petitioners' motion for leave to appeal is not only to close the door as to petitioners' broader permissive appeal remedy (involving subsidiary evidentiary and procedural questions dispositive of the federal questions), but that ruling also aborts any ambition petitioners might have had to pursue, if necessary, the narrower direct appeal[1] remedy (involving direct

1. It is on the matter of the direct appeal approach that petitioners here have avoided the pitfalls of the McMaster case cited in the brief of respondent publisher at page 8. On the instant facts that case is inapplicable because the question of the (Cont'd)

constitutional questions), since the adjudication of "untimeliness" casts its shadow across both remedies. However, with respect specifically to the virgin language of CPLR 5513(c), we submit that the concept of serving a party instead of an attorney with papers is not a radical view in New York. And respondents' argument to the contrary is a bit overdone. In a situation analogous to the case at bar Special Term rejected the contention that service of a notice of disclaimer by an insurance company upon an attorney retained by an injured person to institute a common law negligence action constituted service upon the injured person for purposes of setting into motion a 10 day period of limitation within which the injured person was authorized to institute a statutory action against the Motor Vehicle Accident Indemnification Corporation (MVAIC) — Special Term being of the opinion that the notice was required by the terms of the statute to be served upon the injured party personally. See Matter of Savoy (not officially reported), 232 N.Y.S. 2d 396, affirmed in 22 A.D.2d 855. In this case Special Term said, among other things:

> . . . The statute provides that written notice be given to the injured party by the insurer (Insurance Law, par. 167, subdiv. 8). The term written notice "carries with it the implication of receipt or delivery." (Baldwin v. Fidelity Phenix Fire Insurance Co. N.Y., 6 Cir., 260 F.2d 951, 953.) The language of the statute

---

(Cont'd)
default in the Court of Appeals is the primary question for consideration here, whereas in McMaster the choice of remedy was the primary question before the court.

> is so clear and unambiguous that resort to rules of construction is made unnecessary (New Amsterdam Casualty Co. v. Stecker, 3 N.Y. 2d 1, 6, 163 N.Y.S.2d 626, 143 N.E.2d 357). As heretofore noted, the mandatory language of the Legislature directs that the insurer "shall give written notice as soon as is reasonably possible . . . to the . . . injured person . . . ." (Insurance Law, par. 167, subsec. 8.) . . . .
>
> The court is averse to restricting, by judicial rule, such newly created remedy, a right unknown under common law, where the literal application of the statutory language satisfies the evident purpose of the Legislature. . . .

Also, the clarity of language in CPLR 5513(c) has led one law text writer in New York to comment:

> "In the case of a party seeking permission to appeal, a similar provision is made for service upon him rather than upon his attorney. CPLR 5513, subd c." (Carmondy-Wait 2d, p. 374, note 3.)

Thus, although the Court of Appeals has not overtly construed CPLR 5513(c) in the light of its own practice rule revision and deletion of practice rule III (Petition, p. 17), the conception that notices limiting the period of time for commencing civil actions and prosecuting civil appeals had to be served on the litigant instead of on an attorney has been introduced to lawyers in the state, and had been as of the time the motion was made in the Court of Appeals for leave to appeal on petitioners' behalf and at their express request.

And the dearth of decisional law on the subject by the Court of Appeals only serves to underscore and accentuate in the minds of lawyers in New York the significance of that court's manifest adaptation to this conception.

We submit, therefore, that in keeping with the "sign of the times" petitioners' former attorney was fully justified in believing that the legislature in New York had relieved him of any further responsibility toward petitioners by virtue of an earlier retainer when, more than a month after he had closed his file in the case, he was served with a copy of the notice of entry in question. And we further submit that the attorney cannot be charged with any neglect of petitioners' interests in the interim period when he later acceded to petitioners' request to file the motion for leave to appeal under a new retainer, upon learning that service of the notice of entry had not been made upon petitioners, since that is precisely what CPLR 5513(c) plainly and clearly requires in order to limit the time to make the motion. It is, indeed, a mischievous and elusive argument which presses upon this court the measurement of a procedural default in terms of the inertia of counsel under a system of state law that has induced the very inertia the argument urges this court to condemn.

## II.

THE MANDELL CASE IS CONTROLLING IN THE SECOND DEPARTMENT ON THE QUESTIONS OF UNILATERAL INCONSISTENCIES AND CREDIBILITY RAISED ON A MOTION FOR SUMMARY JUDGMENT.

The case of Mandell v. Field which is cited in the petition on page 20, and which is either ignored or summarily dismissed by respondents on the instant facts, does not involve the application of any obscure principle of summary judgment motion practice in New York. Mandell has been cited in a number of decisions at Special Term for the propositions that unilateral inconsistencies and issues of credibility may not be resolved on motions for summary judgment. See Rogers v. Hirshon (not officially reported), 213 N.Y.S.2d 613; Olivieri v. Moran (not officially reported), 213 N.Y.S.2d 628; Bergman v. Kumm (not officially reported), 213 N.Y.S.2d 832; and Glain v. Glain, 57 Misc.2d 127. And Mandell has been cited by three of the four Appellate Divisions in the state, inclusive of the second department, for broader propositions militating against the resolution of issues raised on motions for summary judgment. See Boyles v. Freeman, 29 A.D.2d 559; Colosimo v. Rosenstock, 15 A.D.2d 663; Sonnino v. Gol-Pak Corporation, 15 A.D.2d 740; and Cooper v. Greyhound Bus Corporation, 13 A.D.2d 173.

The facts of the case which bring Mandell into focus here have been outlined in the petition, and, of course, do not warrant repetition as they speak for themselves. And although we are unable to say for

certain, we believe that the relevancy of Mandell to the instant facts may have influenced Special Term's behavior in the case indirectly. For how else can one find virtue in a written opinion which, if it undertakes to speak on the subject of actual malice at all, elects to do so in an area of the case where the Mandell facts are non-existent in preference to the area of the case where the Mandell facts abound in the record. We submit that any fair appraisal of the facts submitted here at Special Term under the libel causes should lead to the judicial restraint exercised in a recent decision rendered in a libel suit in a federal district court in New York not unlike the case at bar. In McNeil Laboratories, Inc. v. La Verne, S.D.N.Y., New York Law Journal of November 24, 1971, page 1, Col. 6B, involving defamatory statements published in The Physicians' Drug Manual and Behavioral Neuro-Psychiatry about Haldol, a tranquilizer used for treating psychoses, Judge Tyler, applying the constitutional malice test of the New York Times rule stated in his decision, among other things:

> "There is evidence indicating that plaintiff may be able to prove that the published statements of defendants were calculated and knowing distortions of the facts regarding Haldol; that the reported sources and authorities for defendants' published statements were knowingly misrepresented. . . ." (Emphasis added.)

On this premise Judge Tyler denied the defendant-publisher's motion for a summary judgment of dismissal of the complaint. Similarly, in the instant case a direct confrontation with the Mandell facts of record should have produced the same results here.

## III.

### THE QUESTION OF DAMAGES, IF RELEVANT, WAS OBVIOUSLY MISUNDERSTOOD BY THE NEW YORK COURTS, AND, APPARENTLY, BY THE RESPONDENTS BEFORE THIS COURT.

The matter of damages sustained by a plaintiff in a defamation suit is rarely, if ever, a relevant consideration in resisting a motion for summary judgment (as distinguished from a trial) no less so in New York than elsewhere in the country. And Special Term in this case appears to have broached the subject only as a kind of self-indulging assurance that it was not harming petitioner Antonio Mareno through judicial encroachment[2] in an area of the case not tendered to the court on the motion for summary judgment. But even if damages were a relevant concern for the court at this point, it is clear that Special Term was looking in the wrong direction in its assessment of the damage element — being of the opinion that because petitioner Mareno was not engaged in the private practice of law, or "hanging out a shingle", as it were, he could sustain no damage in the practice of his profession. This posture, we submit, constitutes an unduly restricted view of the element of damage in a defamation action.

2. Respondent Margles argues for uniformity of issue between the libel and slander causes in support of Special Term's unannounced invasion of the latter. How can this possibly be in view of the fact that the knowledge with which a publisher writes is, in the very nature of things, different from the knowledge with which his informant speaks? In any event, it should be noted that the attorney who advances this argument on Respondent Margles' behalf is the same attorney who contended at Special Term on behalf of respondent publisher that the slander causes were "independent" of the libel causes.

In the complaint petitioner Mareno pleaded not only past employment as a practising attorney, but also current employment as a law secretary to a federal judge (the language represents the draftsman's characteristization of the actual job description supplied him) (A58-59). Had the state courts allowed themselves to be informed, in a proper judicial setting, of the relevant facts underlying this allegation in the pleading, the following facts would have been developed in the case:

(a) that said petitioner is a law assistant (now some 10 years) to a judge of the United States Customs Court in New York City, a special federal court which, prior to October 1, 1970, possessed both original and appellate jurisdiction;

(b) that the work of the Customs Court is of a specialized nature, the preparation for which is not to be found in the courses of study offered in the law schools, with the result that candidates for service on its professional staff are not recruited from the ranks of recent law school graduates to serve on a rotating or temporary basis, but rather are drawn from the ranks of experienced and practising attorneys in good standing in the customs and other law fields who serve the court on a career basis and at a compensation comparable to what they can earn through employment in private law firms;

(c) that as with many law firms and companies in private industry tenure of service of employees in the court is conditioned, among other

things, upon employee conduct both within and without the court that does not bring the court or its name into disrepute, and employees have been involuntarily separated from service in the court for conduct outside the court which is not exemplary of its moral and ethical standards;

(d) that a substantial number of the judges who administer the affairs of the court, including the judge for whom said petitioner works, resided at the time of the libel in Westchester County wherein respondent publisher's newspaper circulates, and, in fact, one of the court's law assistants residing in Westchester County some 30 miles distant from where said petitioner resides in said county was able to give said petitioner a running account of petitioner's involvement in the Yorktown highway improvement controversy as reported in the press from articles he read in Westchester County based newspapers of the Gannett or Macy chain;

(e) that charges of abuse of legal process and of political scheming publicly uttered are anethema to lawyers in good standing at the bar and to lawyers and other employees in government service, respectively;

(f) that in testimony given in his pre-trial deposition respondent public official gave evidence of being aware, at the time of the slander, that said petitioner was employed in the federal service, from information he sought and obtained from a mutual acquaintance in the Yorktown community;

(g) that respondent public official had a facility for the effective use of the spoken and written word in the persuasion of human beings, having served prior to the slander as campaign manager for the town supervisor in a successfully conducted political campaign for that office, and this talent was articulately pressed into service against petitioners in the slander to bolster the flagging hopes of a town administration for broad-based taxpayer support (in an impending referendum) of an unpopular administration-sponsored tax measure; and

(h) that prior to the utterance of the slander the respondent public official had deliberately misled said petitioner in his response to the petitioner's inquiry relative to the source of town authority for the administration-backed tax measure while being privy to accurate information on the subject of the inquiry.

On the foregoing facts the damage issue foreclosed by the courts is whether the defamatory remarks posed a threat to petitioner Mareno's career in government service, and not as Special Term supposed, a threat to petitioner's career in the private practice of the law. Certainly, the ill-timed gagging invoked against petitioners by respondent publisher can hardly be said to have contributed anything to the protection of that career. But the broader question in the case on the damage issue is whether it is possible for a citizen in this country to find professional fulfillment and a measure of economic security in a career in government service while aspiring to enjoy the benefits and discharge the obligations of

good citizenship; or, whether one facet of such a life must yield to the demands of the other. And since there are thousands of lawyers in government service throughout this nation quietly performing their tasks and living their lives, without whose presence on the job the functions of government would undoubtedly grind to a halt, this broad question of damages seems as worthy of this court's attention as any other question decided in recent years by this court in the defamation field.

## Conclusion

No sound reason has been advanced in the responding briefs which should persuade this court to dismiss or deny the petition.

December 3, 1971.

Respectfully submitted,

ANTONIO MARENO and
KATHLENE C. MARENO,
*Petitioners pro se*

3505 Tulip Drive
Yorktown Heights, N. Y. 10598